IN THE

Supreme Court of the United States

October Term, 1962

No. 81

NATIONAL EQUIPMENT RENTAL, LTD.,
Petitioner,

—against—

STEVE SZUKHENT and ROBERT SZUKHENT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE BANKS NAMED BELOW FOR LEAVE TO FILE THE ACCOMPANYING BRIEF AS AMICI CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLANT'S PETITION FOR A WRIT OF CERTIORARI

DAVID HARTFIELD, JR.
Counsel for: Bankers Trust Co.
14 Wall Street
New York 5, New York

JOHN D. CALHOUN
Counsel for: Chemical Bank New York Trust Co.
1 Chase Manhattan Plaza
New York 5, New York

BENJAMIN C. MILNER, III
Counsel for: Manufacturers Hanover Trust Co.
120 Broadway
New York 5, New York

ROY C. HABERKERN, JR.
Counsel for: The Chase Manhattan Bank
1 Chase Manhattan Plaza
New York 5, New York

MERRELL E. CLARK, JR.
Counsel for: Irving Trust Co.
40 Wall Street
New York 5, New York

HENRY L. KING
Counsel for: Morgan Guaranty Trust Company of New York
The Bank of New York
1 Chase Manhattan Plaza
New York 5, New York

Of Counsel:
WHITE & CASE
MILBANK, TWEED, HADLEY & MCCLOY
CRAVATH SWAINE & MOORE
WINTHROP STIMSON PUTNAM & ROBERTS
SIMPSON THACHER & BARTLETT
DAVIS POLK WARDWELL SUNDERLAND & KIENDL

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Motion

The undersigned banks in the City of New York hereby respectfully move for leave to file the accompanying brief, *amicus curiae* in support of the plaintiff-appellant's petition for a writ of certiorari. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the defendant-respondent was requested but refused.

The Decision Below

In the instant case, the Court of Appeals for the Second Circuit, in a two-to-one decision, held that a designation by a non-resident of a local agent to receive service of process in New York was invalid for lack of an express agreement by the agent to act as such and to notify the principal of the receipt of any process.

Interest of the Undersigned Banks

The interest of the undersigned banks in this case arises from the fact that they are engaging and have engaged in numerous financing, banking and fiduciary transactions, national and international. These transactions take a great variety of forms, of which a few examples are: notes, revolving credit agreements, loan agreements, guarantees, bond and debenture indentures, escrow agreements, fiscal agency appointments and the like. Also, the banks make loans on the security of the assignment of rentals payable under chattel leases of the kind here involved.

In a considerable number of these instruments, particularly those involving borrowers and other customers in foreign countries, there is a clause, similar to the clause under consideration in this case, whereby the customer designates an agent for the service of process in New York. The agent is usually designated in terms of his official capacity, rather than by name. For instance, there are designations of agents in terms of "the Consul General of Canada in New York", "the Secretary of the X Bank", "any partner in the law firm of A, B and C". If the opinion of the Court of Appeals requires, as it appears to, that the agent

indicate his consent at the time of the appointment, that requirement is impossible to satisfy when the agent is designated by office rather than by name. If the opinion means that the consent may be given subsequently by each successive incumbent of the office, the requirement is not only unduly burdensome but presents the very real danger that the incumbent will be unaware of, or will overlook, the need to express his consent to the principal. In those cases where the agent is designated by name, express consent by the agent to act as such is probably the exception rather than the rule.

Questions of Law and Fact that May Not Adequately Be Presented by the Parties

The undersigned believe that there are at least three relevant issues of fact and law which they can submit to this Court over and above the material that has been, and apparently will be, submitted by the Petitioner.

First, as indicated above, the undersigned have daily and firsthand knowledge of the great practical utility in commercial and financial transactions of the designation of a local agent to receive service of process, the wide variety of the situations in which this practice is used and the unwarranted damage that the instant decision would do to this practice.

Second, the undersigned have noted that the rules of the law of agency, particularly the *Restatement 2d*, as applied to the designation of an agent to receive service of process, were not discussed in the briefs of the parties in the Court of Appeals or in the Petition for Certiorari, although the *Restatement* was the principal authority relied on by the

majority in the decision below. Since we believe that the court below applied incorrect agency principles, we request the opportunity to brief this Court on the subject.

Third, there are numerous instances in which non-resident persons are required, by administrative rule, to designate a local agent to receive service of process or to receive service of formal papers akin to process. For example, the Securities and Exchange Commission requires the inclusion in each Registration Statement of the name and address of an agent for service (Form S-1); it requires in each application for registration as a broker or dealer, and in each application for registration as an investment adviser, a consent by the applicant that notice of any proceeding before the Commission may be served on a person designated by the applicant (Forms BD and ADV). None of these forms provides for any expression of consent by the person so designated.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Reasons for Granting the Writ

In holding invalid a provision in a chattel lease appointing a third person, not a party to the lease, agent of the lessee to receive process in any action arising out of the lease, the Court of Appeals for the Second Circuit placed an unwarranted interpretation on Rule 4(d) of the Federal Rules of Civil Procedure, and decided a question of law which is of major importance to the financial and business communities in a manner inconsistent with well established patterns of business and in conflict with principles of law established by other courts.

The court below, Judge Moore dissenting, decided that Rule 4(d) requires that an agent appointed to receive process specifically undertake to act as agent, and specifically undertake to give notice to his principal that the agent has been served with process on behalf of the principal. It is not clear from the opinion at exactly what time the agent's consent must be given. It is clear that the majority of the Court held that there is no effective agency until the agent has expressed his consent and, more important, that action under the appointment is not a sufficient consent.

So far as we have been able to determine, this is the first case in which the appointment of an agent to receive service of process has been invalidated.

Paragraphs (1) and (3) of Rule 4(d) provide that service of process upon an individual, corporation, partnership

or unincorporated association may be made on "an agent authorized by appointment or by law to receive service of process". By the terms of the lease, Weinberg was appointed agent of the lessee. She acted as such by receiving the process and promptly forwarding a copy to her nonresident principals, the defendants. This is true even though she did not specifically undertake to act as agent for the lessee. The agency relationship of course is consensual, but the agent's consent may be in the form of the required act rather than an agreement to perform the required act.

The sole affirmative authority relied upon by the majority below was the *Restatement of Agency*, §§ 1 and 15.* The misinterpretation, in the majority opinion, of this fundamental text may amount to a drastic re-writing of one of the basic rules of the law of agency. Comment a to Section 1 contains the statement, "the agent must act or agree to act on the principal's behalf and subject to his control." The three Illustrations to Section 15 are precisely in point; they all involve cases where the agent acts without otherwise communicating his consent to the principal. Comment a to Section 26 states categorically: "It is not essential to the existence of authority that there be a contract between the principal or agent or that the agent promise or otherwise undertake to act as agent." The majority below appear to have been concerned by the fact that the agent was unknown to the defendants at the time of her appointment and that the defendants had never dealt with her. Comment b to Section 26 states that the manifestations by the principal to the agent can be made by the principal directly, or by any means intended to cause the agent to believe that he is authorized. That was the situation in the present case.

* In this Brief, all citations to the *Restatement* are to the Second Edition (1958).

For the reasons set forth in the preceding Motion, to require an agent to give a specific undertaking to act would upset well-settled procedures in important transactions in the financial and business communities. It would also become a trap for the many lawyers and business men who are not aware of the decision of the Court of Appeals in this case.

The court below, in addition to misinterpreting the applicable agency law also interpreted Rule 4(d)(1) and (3) as requiring the designated agent to undertake to give notice to his principal of any future service of process. This is not required by the language of the Rule, and this interpretation is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (1957), where a contract provision similar to the one under discussion, with no requirement for the giving of notice to the principal, was held to be valid—even in favor of a person who was not a party to the contract.

In addition to this conflict in decisions, there is the additional point that the court below decided an issue of far-reaching importance which was not properly before it. While holding that there must be an undertaking by the agent to give notice of service of process to the principal and that because of such requirement the service in the case was invalid, the court held that the fact that in this case notice in fact was given was irrelevant. Notice was given, so there could be no denial of due process. The court rested its conclusion on *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928), a case which decided that a state non-resident motorist statute was unconstitutional since it did not require the statutory agent to give notice to the defendant. This Court reached that result even though notice was in fact given,

on the ground that (276 U. S. at 24) "Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it; . . ." But in the present case, the court below recognized that a provision for notice is not necessary when individuals freely contract. The difference between the two situations is manifest. *Wuchter* involved an agency forced upon the "principal" by statute and necessarily raised the important constitutional question of due process to the "principal". In the case at bar, the only issue is the effectiveness of the service pursuant to contract, and this issue does not bring into play any question as to the constitutionality of a statute. It is merely an issue of what was in fact done. In fact, notice was given, and there was a valid appointment of an agent. These two factors should have foreclosed the issue from the court's consideration. As Professor Moore states:

> "The phrase 'an agent authorized by appointment to receive service of process' is intended to cover the situation where an individual actually appoints an agent for that purpose. No question of due process arises with respect to service upon an agent in such a situation." Moore's *Federal Practice*, 2d ed. ¶ 4.12, p. 931.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated New York, N. Y.
March 15, 1963.

Respectfully submitted,

DAVID HARTFIELD, JR.
Counsel for: Bankers Trust Co.
14 Wall Street
New York 5, New York

ROY C. HABERKERN, JR.
Counsel for: The Chase Manhattan Bank
1 Chase Manhattan Plaza
New York 5, New York

JOHN D. CALHOUN
Counsel for: Chemical Bank New York Trust Co.
1 Chase Manhattan Plaza
New York 5, New York

MERRELL E. CLARK, JR.
Counsel for: Irving Trust Co.
40 Wall Street
New York 5, New York

BENJAMIN C. MILNER, III
Counsel for: Manufacturers Hanover Trust Co.
120 Broadway
New York 5, New York

HENRY L. KING
Counsel for: Morgan Guaranty Trust Company of New York
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